Nos. 91-952 & 91-883

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND AMERICAN FAMILY ASSOCIATION, INC.,

Petitioners,

—v.—

ACTION FOR CHILDREN'S TELEVISION, THE PACIFICA FOUNDATION, *et al.*,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

—v.—

ACTION FOR CHILDREN'S TELEVISION, THE PACIFICA FOUNDATION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS THE PACIFICA FOUNDATION, PEN AMERICAN CENTER, ALLEN GINSBERG, *ET AL.*, TO PETITIONS FOR WRITS OF CERTIORARI

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January 31, 1992

QUESTION PRESENTED

Whether the court of appeals erred, based on the record before it, in holding that a Federal Communications Commission regulation and a statute that would ban all speech deemed "indecent" by the FCC from broadcast over the radio and television in the United States on a 24-hour per day basis violate the First Amendment, particularly in light of the extraordinarily vague and broad "generic definition" of "indecency" promulgated by the FCC, and in remanding the matter to the FCC for redetermination of numerous unresolved issues.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the Petition of the Federal Communications Commission, No. 91-952, at ii. None of the respondents herein have any parent companies or subsidiaries. *See* Sup. Ct. Rule 29.1.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 2
1. Background 3
2. The FCC's generic "indecency" standard 5
3. The *ACT I* decision 6
4. Proceedings in *ACT II* 7
5. The *ACT II* decision 11
REASONS FOR DENYING THE PETITIONS 13
CONCLUSION 29

TABLE OF AUTHORITIES

Cases Page

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ..... *passim*
Baggett v. *Bullitt*, 377 U.S. 360 (1964) 28
Barnes v. *Glen Theatre, Inc.*, ___U.S.___, 111 S.Ct. 2456 (1991) 16
Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) ..... *passim*
Blum v. *Bacon*, 457 U.S. 132 (1982) 26
Butler v. *Michigan*, 352 U.S. 380 (1957) 20
Carey v. *Population Services International*, 431 U.S. 678 (1977) 19, 21
Carlin Communications, Inc. v. *FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) 22, 26
City of Mesquite v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) 27
City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) 22
Cohen v. *California*, 403 U.S. 14 (1971) 18, 19, 20
Community Television v. *Wilkinson*, 611 F.Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987) 22
Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530 (1980) 18, 25

Page

Cruz v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985) 22, 23
Erznoznik v. *City of Jacksonville*,
422 U.S. 205 (1975) 19, 21
Fabulous Assoc., Inc. v. *Pennsylvania Public Utilities Commission*, 896 F.2d 780 (3d Cir. 1990) 23
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) .. *passim*
Frisby v. *Schultz*, 487 U.S. 474 (1988) 17
Ginsberg v. *New York*, 390 U.S. 629 (1968) 23
Houston v. *Hill*, 482 U.S. 451 (1987) 27, 28
Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976) 28
Kolender v. *Lawson*, 461 U.S. 352 (1983) 27
Kovacs v. *Cooper*, 336 U.S. 77 (1949) 17
Lehman v. *Shaker Heights*, 418 U.S. 298 (1974) 17
Martin v. *City of Struthers*, 319 U.S. 141 (1943) 18
NAACP v. *Button*, 371 U.S. 415 (1963) 28
Pacifica Foundation v. *FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978) 24
Rowan v. *Post Office Department*,
397 U.S. 728 (1970) 18
Sable Communications of California, Inc.
v. *FCC*, 492 U.S. 115 (1989) ..... *passim*
Schad v. *Borough of Mount Ephraim*,
452 U.S. 61 (1981) 22
Schneider v. *State*, 308 U.S. 147 (1939) 25
Secretary of State v. *J.H. Munson Co.*,
467 U.S. 947 (1984) 28
Smith v. *Goguen*, 415 U.S. 566 (1974) 27
Spence v. *Washington*, 418 U.S. 405 (1974) 25
Washington v. *Yakima Indian Nation*, 439
U.S. 463 (1979) 26

Page

Administrative Decisions and Orders

Enforcement of Prohibitions Against Broadcast Indecency, 4 F.C.C.Rcd 8358 (Nov. 20, 1989) 8, 21
Pacifica Foundation, 95 F.C.C.2d 750 (1983) 4
Pacifica Foundation, 59 F.C.C. 2d 892 (1976) 4
Pacifica Foundation, 56 F.C.C.2d 94 (1975) 3, 4, 5
WGBH Educational Foundation, 69 F.C.C.2d 1250 (1978) 4

Constitution and Statutes

U.S. Const. Amend. I ..... *passim*
18 U.S.C. § 1464 ..... 4, 5, 6, 7, 28
47 U.S.C. § 312(a)(6) 4, 28
47 U.S.C. § 312(b) 4
47 U.S.C. § 503(b)(1)(D) 4, 28
47 U.S.C. § 503(b)(2)(A) 28
Pub.L. No. 100-459, Title VI, § 608, 102 Stat. 2228 (1988) 7

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Respondents The Pacifica Foundation ("Pacifica"), petitioner below, and PEN American Center ("PEN"), Allen Ginsberg, Norman Mailer, William S. Burroughs, Intercollegiate Broadcasting Systems, Inc., National Federation of Community Broadcasters, City Lights Booksellers & Publishers, David H. Halperin, Michael McClure, and Eileen Myles, intervenors below, respectfully request that this Court deny

the petitions for writs of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned matter.

STATEMENT OF THE CASE

This case involves an attempt by the Federal Communications Commission ("the FCC") to prohibit at any time of day or night on any radio or television station anywhere in the United States the broadcast of any speech that the FCC believes is "indecent" under the FCC's broad and vague "generic" definition of "indecency." The decision of the court of appeals, which, consistent with decisions of this Court and other courts of appeals, declared unconstitutional this unprecedented ban on the broadcast of core protected speech, is but a stage in one ongoing, incomplete proceeding. The matter has now been remanded to the FCC for redetermination of numerous issues after a full and fair hearing.

At the outset, respondents wish to emphasize that it is the FCC, not Congress, that has chosen a broad definition of "indecency" not limited to "nude dancing . . . adult movies . . . and sexually explicit messages like those now available on the telephone medium." Government Petition, at 10 ("Pet. at __"). Rather, the FCC's definition of "indecency" would ban from the airwaves speech that includes a wide range of serious political, social, literary, and artistic expression at the very core of the First Amendment. Because the plays of Shakespeare, the novels of James Joyce, and the poems of Allen Ginsberg all potentially fall within this definition, the FCC's ban strikes at the very heart of the First Amendment rights of broadcasters, writers and artists, and listeners alike. Although the government suggests that sexually explicit pornographic material will assault the airwaves in the absence of a 24-hour ban on "indecent" speech, Pet. at 10, the fact is that at least since 1975, broadcasters have been permitted to channel

"indecent" speech to the late evening hours. Yet the FCC has not cited a single broadcast of the type of pornographic material that it now claims justifies its draconian ban.

Throughout more than fifteen years of litigation and controversy concerning FCC efforts to censor so-called "indecent" broadcast speech, the FCC has focused consistently, and until very recently, exclusively, on the purported need of enabling parents to protect their *children* from "indecent" speech. Only in the most recent stages of this controversy has the FCC even suggested that its authority to punish "indecent" speech also derives from a claimed power to prevent *any adult* American from receiving indecent broadcast speech in the privacy of his or her home. Now, in its petition to this Court, for the very first time, the government places front and center this asserted "privacy of the home" interest to justify its absolute broadcast ban. In so doing, the government attempts to obscure the fact that the decision of the court below is an unremarkable application, based on its consideration of the evidentiary record, of the well-settled doctrine that an absolute content-based ban on constitutionally-protected speech cannot be sustained when it is obviously not the least restrictive, or even a narrowly tailored means, of achieving a compelling interest of the government.

1. Background

The "modern era" of FCC indecency regulation commenced in 1975, when the FCC ruled that a 2 p.m. radio broadcast of a satiric monologue on contemporary attitudes toward language, entitled "Filthy Words" by the popular comedian George Carlin, was "indecent". *See Pacifica*

Foundation, 56 F.C.C.2d 94 (1975).[1/] The FCC explicitly defined "indecency" in relation to the presence of children in the audience: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs, *when there is a reasonable risk that children may be in the audience*." *Id.* at 98 (emphasis added); *see* Appendix of Petitioner FCC at 41a (hereinafter "Pet. App. ___"). In a clarification, the FCC stated that it "'never intended to place an absolute prohibition on this type of language, but rather *sought to channel it to times of day when children most likely would not be exposed to it*.'" *Pacifica Foundation*, 59 F.C.C.2d 892 (1976) (emphasis added), *quoted in FCC* v. *Pacifica Foundation*, 438 U.S. 726, 733 (1978). The FCC defined children as those under age 12. Pet. App. at 32a-33a.

In *Pacifica*, this Court, in a 5-4 decision, affirmed the FCC's order and found the Carlin Monologue "indecent *as broadcast*." 438 U.S. at 735 (emphasis added). The Court "emphasize[d] the narrowness of [its] holding," *id.* at 750, and noted that its decision was based on "consideration of a host of variables," *id.*, including "[t]he time of day . . . [and] [t]he content of the program [,which] will also affect the composition of the audience," *id.*

Thereafter, the FCC followed a recognized policy of "channeling" "indecent" broadcast speech to the hours after 10 p.m., and of treating as "indecent" speech that involved repetitive use of words similar to those used in Carlin's monologue. Pet. App. 18a, 43a & n.12; *see WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254-55 (1978); *Pacifica Foundation*, 95 F.C.C.2d 750 (1983).

[1/] The FCC asserts authority to prohibit the broadcast of constitutionally-protected, but "indecent," speech pursuant to 18 U.S.C. § 1464 and 47 U.S.C. §§ 312(a)(6), (b), 503(b)(1)(D).

2. The FCC's "generic" indecency standard

The instant proceeding began with the FCC's April 29, 1987, release of a Public Notice and three orders in which, without prior notice of its intentions, the FCC greatly expanded the scope of speech that it would consider "indecent." *See* Pet. App. 162a-191a.[2/] The FCC stated that it would return to its 1975 definition of "indecent" speech set forth in *Pacifica Foundation*, 56 F.C.C.2d at 98, which would be "actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience." Pet. App. 182a-183a (internal quotations omitted).

A number of interested parties sought reconsideration and clarification of these orders. In its December 29, 1987, Reconsideration Order, Pet. App. 39a-74a, the FCC refused to modify or to clarify its new "generic definition." *Id.* at 52a. Moreover, it refused to establish a clearly defined "safe harbor" for "indecent" material, merely stating that "after midnight" was its "current thinking." *Id.* at 62a n.47. As the FCC properly recognized, however, this Court in *Pacifica*

> made plain that our authority under Section 1464 is limited to the imposition of reasonable time, place and manner restrictions on the broadcast of indecent material in order to advance the government's interest in protecting children and in enabling parents to determine when and how their children are to be exposed to this material. . . . *we may only do that which is necessary to restrict children's access* to indecent broadcasts; *we may not go further so as to preclude access by adults* who are interested in seeing or hearing such material. . . . [a] reading of

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[2/] The FCC found that three broadcasters, including respondent Pacifica, had broadcast "indecent" speech under its new generic standard. Pet. App. 162a-191a.

> Section 1464 . . . under which the broadcast of indecent material *would be prohibited altogether would, we believe, run afoul of this constitutional premise.*

Id. at 49a-50a (emphasis added); *see also id.* at 62a n.47.

3. The *ACT I* decision

On review of the Reconsideration Order, the court of appeals affirmed in part and reversed in part. *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C.Cir. 1988) (hereinafter "*ACT I*"); Pet. App. 13a-38a. In *ACT I*, the FCC explicitly acknowledged that its *sole* interest in regulating "indecent" speech is "in protecting unsupervised children from exposure to indecent material; the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes." Pet. App. 37a (emphasis original). Although the court in *ACT I* recognized that "vagueness is inherent" in the FCC's broad, generic definition of "indecent" speech, *id.* at 38a, it refused to consider the vagueness issue on the merits. Rather, it held that this Court's decision in *Pacifica* foreclosed further inquiry, *id.* at 24a-26a, although this Court's "emphatically narrow holding" in *Pacifica*, *see Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989), certainly did not appear to adopt the FCC's generic definition of indecency. The court in *ACT I* also rejected an overbreadth challenge mounted by various parties based on the FCC's failure to recognize serious merit as a constitutionally required defense. Pet. App. 27a-29a.

The court in *ACT I*, however, held that "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule." *Id.* at 36a n.18. The court then remanded the matter to the FCC "for redetermination, *after*

a full and fair hearing, of the times at which indecent material may be broadcast." *Id.* at 38a (emphasis added).[3/]

Following the decision in *ACT I*, Congress adopted a rider to an appropriations bill, known as the "Helms Amendment," which required the FCC to promulgate regulations that would ban the broadcast of "indecent" speech 24 hours a day effective no later than January 31, 1989. Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988); Pet. App. 75a. The FCC then refused to conduct the "full and fair hearing" mandated in *ACT I*. Pet. App. 76a-77a. Instead, on December 21, 1988, the FCC adopted a rule that "[t]he Commission will enforce . . . Section 1464 . . . on a twenty-four hour a day basis." *Id.* at 75a. Although the Helms Amendment did not so require, the FCC further stated that it "will continue to apply its generic definition of indecency. . . ." *Id.* at 77a.

4. Proceedings in *ACT II*

On January 23, 1989, the court of appeals granted the motion of the petitioners below to stay enforcement of the absolute ban on broadcast indecency, pending full review by that court. *Action for Children's Television* v. *FCC*, No. 88-1916 (D.C. Cir. Jan. 23, 1989) ("*ACT II*"), Joint Appendix filed in No. 88-1916 (D.C. Cir.), at 3 (hereinafter "J.A. ___"). Thus, the 24-hour ban has never gone into effect. While *ACT II* was pending, this Court decided *Sable Communications*, *supra*, in which this Court reaffirmed that "indecent," but not obscene, speech is protected by the First Amendment, and that content-based restrictions on "indecent" speech are subject to

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[3/] The *ACT I* court also criticized the FCC's unexplained decision to raise its definition of "children" from under 12 years to under 18 years and its failure to consider the "predicted audience for the specific radio station in question," rather than "the *total* radio audience," and remanded those issues as well. Pet. App. 32a (emphasis original).

strict judicial scrutiny. 492 U.S. at 126. After *Sable*, the FCC sought to "remand the record" to permit it "to collect data relevant to a judicial determination of the validity of a total ban on broadcast indecency." *ACT II*, Motion for Remand, at 1, 2-3 (filed Aug. 24, 1989), J.A. 6-8. The court granted the motion, and ordered, for the *second* time, that the "FCC *shall conduct a full and fair hearing* on the issue of the propriety of indecent broadcasting . . . ." *ACT II*, Order (D.C.Cir. Sept. 13, 1989), J.A. 4 (emphasis added).

The FCC, however, again chose to ignore the court's order. Instead, the FCC issued a Notice of Inquiry ("NOI") the stated purpose of which was "to allow [the FCC] to compile a record *in support of* Congress' imposition of a 24-hour ban on the broadcast of indecent material." Enforcement of Prohibitions Against Broadcast Indecency, 4 F.C.C. Rcd 8358 (Nov. 20, 1989), J.A. 12 (emphasis added). In the NOI, for the first time in these proceedings, the FCC suggested in a footnote, "an alternative government interest in protecting the public's right to be free from indecent material in the privacy of their homes." *Id.* at 8365 n.10, J.A. 19.

The respondents herein submitted comments to the FCC in which they challenged the total ban and the generic definition on various grounds. They argued, *inter alia*, that numerous important works of art and literature that included "indecent" language, and which have been previously broadcast, particularly on noncommercial radio stations, would be forever banned from the airwaves of this country.[4/] These respondents also showed that small noncommercial radio stations in particular, which focus on an adult audience, and which often engage in innovative, non-mainstream programming, were forced to engage in costly self-censorship because

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[4/] *See* Comments of Pacifica, *et al.*, at 13-20, J.A. 320-27; Comments of PEN, *et al.*, at 4-8, 16-20, J.A. 376-80, 388-92.

they were necessarily left to guess at whether much of their programming fell within the generic definition. As a result, they showed that a 24-hour ban would eliminate a broad range of serious literature, art, music, social commentary on such topics as AIDS and homosexuality, news, and public affairs programming that is unavailable elsewhere.[5/] Pacifica also submitted data showing that the audience of minors for noncommercial radio stations is statistically insignificant.[6/] Other commentors provided undisputed evidence that the vast

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[5/] *See* Pacifica Comments, at 13-20, 25-27, and Attachments 1 & 2, J.A. 320-27, 332-34, 348-60, PEN Comments, at 16-17, J.A. 388-89. For example, many dramatizations of literary works read live on the radio and oral presentations by the authors of such works are not available elsewhere. Under the FCC's broadened indecency standard, Pacifica radio stations have been forced to cancel or heavily edit daytime dramatic readings of contemporary and classic literary works, including, to list only a few, Allen Ginsberg's *Howl*, Alice Walker's *The Color Purple*, James Joyce's *Ulysses* and John Steinbeck's *The Grapes of Wrath*. They have also cancelled or heavily edited the airing of interviews with some of the most controversial and provocative personalities of our times, including Abbie Hoffman, Miles Davis and Dick Gregory, and discussion programs on a range of topics such as AIDS, rape and sexuality for older women. Under a 24-hour ban, virtually none of this programming would be available to the public from any source. Likewise, live news broadcasts, live coverage of public trials and public hearings are not otherwise available. Furthermore, the broadcast medium is an important resource for millions of illiterate Americans and is free of direct costs to the audience.

[6/] Teen listening to public radio accounts for a mere 0.2% of teen listening generally and for virtually no percentage of total radio listening. Pacifica Comments, at 21-25, and Attachment 4, J.A. 328-32, 366-72.

majority of children and teenagers are subject to an opportunity for adult supervision, particularly at night.[7/]

The FCC issued its Report on August 6, 1990, Pet. App. 82a-161a, in which, not surprisingly in light of its self-proclaimed mandate to compile a record in support of its ban, it found that a broadcast ban on constitutionally protected "indecent" speech was proper. The FCC explicitly conceded that its 24-hour ban could withstand constitutional scrutiny only if it served a compelling interest and was "'the least restrictive means to further the articulated interest.'" *Id.* at 91a (quoting *Sable*, 492 U.S. at 126).

The FCC nevertheless asserted that the 24-hour ban met this strict test because of ratings data that showed that *some* teenagers remained in the overall broadcast audience at all times. *Id.* at 129a-131a. This finding, in turn, rested on a redefinition of "children" to include 12-17 year-olds. The *only* data that shows that minors remain in the radio audience after 10 p.m. concerns 12-17 year-olds as an undifferentiated bloc. *See* Pet. at 17; Pet. App. 32a n.16, 111a. Thus, to justify the ban, the FCC had no choice but to change its definition of "children." Furthermore, disregarding its position in *ACT I*, *id.* at 36a-37a, the FCC asserted an independent interest in ensuring that all children and teenagers under eighteen years old are not exposed to any "indecent" speech, regardless of parental opportunity to supervise and regardless of parental wishes, *id.* at 94a-95a & n.22; 121a-122a. In response to the unrefuted evidence that virtually all minors are subject to the opportunity for adult supervision, the FCC took the unprecedented position that, regardless of parental wishes, *the government* would only be satisfied with "active[]" supervision

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[7/] Comments of Action For Children's Television, *et al.*, at 29-34 and Appendix C, J.A. 130-35, 232-50.

"at all times" of minors' viewing and listening habits. *Id.* at 128a.

The FCC also determined that, as an affirmative defense to a charge of indecent broadcasting, broadcasters may show that at the time the challenged broadcast was aired, minors are generally not in the audience in the station's *market area*; it would *not* be a defense to show that minors do not listen to the station at the time of the broadcast. *Id.* at 145a-147a. This determination ignored *ACT I*, which held that the FCC must show, at a minimum, that significant numbers of children are in the audience *of a particular station* at the time it airs an "indecent" broadcast. *Id.* at 32a.

The FCC devoted a mere two perfunctory paragraphs in its 96-paragraph Report to its novel proposition that "preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition." *Id.* at 100a-102a. It did not attempt to reconcile this asserted interest, however, with its provision of an affirmative defense based on the absence of *minors* in the audience.

5. **The *ACT II* decision**

On review, the court below (Mikva, C.J., Edwards and Thomas, J.J.) held that the FCC's blanket prohibition violated the First Amendment. Pet. App. 1a-12a.[8/] The court, after reviewing the record and considering the appropriate standard for restricting constitutionally protected speech under *Sable* and *ACT I*, held that the Constitution precluded the FCC's proposed absolute broadcast ban on constitutionally protected "indecent" speech. *Id.* at 9a-11a. The court further noted that

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[8/] Following the issuance of the Report; the intervenor-respondents herein, all of whom had filed comments with the FCC, sought and were granted leave to intervene and join in the separate brief of The Pacifica Foundation, a petitioner in both *ACT I* and *ACT II*.

nothing in the appropriations rider or the FCC's Report altered the force of the constitutional standards applied in *ACT I* and reiterated by this Court in *Sable*. *Id.* at 10a-11a.[2/] For the *third* time, the court below:

> direct[ed] the Commission, in "redetermin[ing], *after a full and fair hearing*, . . . the times at which indecent material may be broadcast," to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population; and the scope of the government's interest in regulating indecent broadcasts. *See ACT I*, 852 F.2d at 1341-44.

Id. at 12a (emphasis added).

The FCC and intervenor Citizens For Decency Through Law, Inc. (now Children's Legal Foundation, Inc.) sought rehearing and rehearing *en banc*, which requests were denied on August 28, 1991, with no judge of the court requesting the taking of a vote. *Id.* at 192a-193a. The two petitions for certiorari followed. This Court granted respondents' request to file their opposition briefs by January 31, 1992, and to respond to both petitions in each opposition brief.

[2/] The court also followed *ACT I* in rejecting vagueness and overbreadth challenges to the FCC's generic indecency definition. Pet. App. 7a-8a. Given its holding that the 24-hour ban was unconstitutional, the court did not address Pacifica's related argument that, even if the generic definition is not unconstitutionally vague and overbroad when joined with a clear safe harbor, the generic definition could not be sustained under a 24-hour ban on "indecent" speech. *See* Point III, *infra*.

REASONS FOR DENYING THE PETITIONS

The petitioners have failed to set forth any reason to review the unanimous decision of the court below that the FCC's absolute broadcast ban on constitutionally protected speech violates the First Amendment. In two decisions, one stay order, and petitions for rehearing and rehearing *en banc*, not one judge of the court below has stated that such a ban is constitutional. Indeed, prior to passage of the appropriations rider in 1989, the FCC itself explicitly acknowledged that the ban it now defends before this Court is unconstitutional.

The decision below carefully follows the decisions of this Court in *Sable* and *Pacifica*, and breaks no new legal ground. Petitioners do not allege a conflict in the circuits, as none exists. Indeed, the government appears to be most dissatisfied with the brevity of the decision below, demanding this Court's review "to assure that Congress's and the Commission's resolution of the important interests at stake receives more meaningful consideration than the court of appeals gave it." Pet. at 20. The government simply ignores the fact that the court below, after consideration of the record and the arguments, once again remanded the matter to the FCC to consider numerous unresolved issues, including "the scope of the government's interest in regulating indecent broadcasts," after a "full and fair hearing," Pet. App. 12a, which the FCC has steadfastly refused to hold.

Petitioners' complaint that the court below did not explicitly address the government's purported interest in protecting adults in the privacy of the home obscures the fact that the government barely made mention of this argument in its Report, brief, or argument below, and that the FCC itself clearly did not consider this "interest" to be sufficient to justify its absolute ban. Only now, on petition to this Court, has the government for the first time emphasized this argument. The decision of a court of appeals not to address

directly an argument that the government itself chose to downplay, but rather to remand for redetermination after a proper hearing, is no reason for this Court to grant review. In any event, the government's position that it may totally ban any speech from radio or television that it believes some adult Americans might find offensive in order to "preserve the privacy of the home" is a meritless and unprecedented argument that does not justify this Court's review.

The petitioners also provide no reason to review the decision below that the broadcast ban is unnecessary to achieve the government's interest in facilitating parental control of their children. The decision below adheres faithfully to the controlling principles of *Pacifica* and *Sable*, and petitioners are again unable to cite any case that supports the ban. The court of appeals, moreover, reviewed the record and, finding it deficient in numerous respects, remanded for a full and fair hearing at which all of the pertinent issues are to be explored. Review by this Court prior to this hearing would be wasteful of this Court's resources and would present an incomplete record for determination of the constitutional issues.

The court of appeals did not reach the alternative ground for affirmance raised below that, even if a 24-hour broadcast ban were theoretically constitutional, a ban based on the FCC's extraordinarily broad and vague definition of "indecency" could not be sustained. This definition is solely the creation of the FCC, and is not compelled by any act of Congress or by the courts. On remand, therefore, the FCC may choose to pursue a more limited definition. Such a narrowing of the defintion of "indecency" might, in turn, affect the view of the courts on the constitutionality of any regulation ultimately promulgated by the FCC. In the absence of any narrowing, the FCC's generic definition, when combined with a 24-hour ban, would have an *in terrorem* effect on broadcasters that would cause them to remove a broad range

of protected speech from the airwaves out of fear that the FCC might deem such programming "indecent." Indeed, even with time-channeling, the generic definition is so vague that it impermissibly fails to put a reasonable broadcaster on notice of what speech the FCC might find "indecent."[10/]

I. In the court below, the government barely asserted a purported interest in protecting the privacy of the home and certainly made no claim that this interest was an independent compelling interest that could only be served by an absolute broadcast ban on so-called "indecent" speech.[11/] Indeed, the FCC itself has undermined any such claim by its creation of a defense to a charge of indecency when a broadcaster shows that children were not in the broadcast audience in the station's market area at the time of an "indecent" broadcast. Pet. App. at 145a-146a.

The government's petition is based less upon the assertion that the ban is justified by a purported interest in protecting some adults in the privacy of their home than upon the assertion that "the court was obligated to consider all the legitimate justifications for the statute at issue." Pet. at 14. This argument is wrong on several grounds. First, the government provides no citation for the remarkable proposition that the federal courts must directly address on the

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[10/] Respondents herein concur fully in the arguments of respondents Action For Children's Television, *et al.*, that the petitions should be denied because, *inter alia*, the decision below is not final and the matter has been remanded to the FCC for a full and fair hearing of numerous relevant issues, and because this matter will not be reviewed by the full Court as Justice Thomas joined in the decision below.

[11/] In its 50-page brief below, the government devoted one short paragraph to this issue, and argued only that "the asserted interest in protecting the privacy of the home from unwanted indecent broadcasts has received judicial recognition." Gov. Br. at 36. It did not raise the issue at oral argument.

merits every argument presented by the government, no matter how meekly, and that the failure to do so entitles the government to this Court's review. Second, the government simply ignores the fact that the court below gave this argument the consideration it deserved when it ordered the FCC, for the third time, to "redetermin[e], after a full and fair hearing . . . the *scope of the government's interest* in regulating indecent broadcasts." Pet. App. 12a (emphasis added). No law or precedent requires more.

In any event, the government's argument that its asserted interest in protecting objecting adults justifies the absolute broadcast ban is directly contrary to well-settled doctrine of this Court and does not merit review. As the government has expressly conceded, and as this Court has recently reiterated, speech dubbed by the FCC as "indecent but not obscene is protected by the First Amendment." *Sable*, *supra*, 492 U.S. at 126; *see* Pet. App. 88a.[12/] Moreover, the parties are in full

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[12/] In its petition, the government wrongly suggests that "indecent speech is only marginally within the 'outer perimeters of the First Amendment.'" Pet. at 19 (quoting *Barnes* v. *Glen Theatre, Inc.*, ___U.S.___, 111 S.Ct. 2456, 2460 (1991)). In *Barnes*, however, this Court was not referring to broadly-defined generic "indecent" speech, but specifically to nude barroom dancing, which this Court characterized as "expressive conduct" akin to symbolic speech. *Id.* at 2460-61. Having chosen a generic definition of indecency, Pet. App. 77a, which encompasses broad categories of serious core protected speech, the FCC cannot now pretend that it only seeks to ban the broadcast of "nude dancing . . ., adult movies . . ., and sexually explicit messages like those now available in the telephone medium." Pet. at 10. The FCC has never contended, nor could it, that any broadcaster has attempted to broadcast speech of this nature or that broadcasts of this sort led to the imposition of the 24-hour ban. *See* FCC Report, Concurring Statement of Commissioner Quello, at 2 & nn.4 & 5. Rather, the FCC has chosen to punish the broadcast of humorous and satiric songs or banter consisting of sexual innuendo, double entendres, and occasional

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agreement that the government may only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126; Pet. App. 88a-89a. Protection of adults from possible momentary exposure to "indecent" speech as defined by the FCC is not a compelling interest and, in any event, an absolute broadcast ban is neither the least restrictive nor even a narrowly tailored means of achieving the asserted interest.

Broadcast speech does not intrude into the home in the same way that speech intrudes upon a truly "captive audience." Thus, there is no compelling interest in protecting adults from possible momentary exposure to such speech. While this Court has recognized the rights of "captive" audiences to be free of unwanted speech, it has only allowed such restrictions "when the 'captive' audience *cannot avoid* the objectionable speech." *Frisby* v. *Schultz*, 487 U.S. 474, 487 (1988) (emphasis added) (individualized residential picketing, where "[t]he resident is figuratively, and perhaps literally, trapped within the home, and . . . is left with no ready means of avoiding the unwanted speech") (emphasis added); *see Lehman* v. *Shaker Heights*, 418 U.S. 298, 307-08 (1974) (public transportation riders); *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (blaring loudspeakers leave residents "practically helpless to escape this interference" with privacy).

This Court, however, has explicitly refused to extend the "captive audience" exception to situations in which the unwilling recipient can readily avoid exposure, including within the privacy of the home. *See, e.g., Bolger* v. *Youngs*

[12/] (...continued)
"dirty" words (not unlike certain passages in Shakespeare's plays), as well as serious dramatic works aimed at adult audiences. *See* Pet. App. 162a-191a; J.A. 714-78.

Drug Products Corp., 463 U.S. 60, 72 (1983); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 542 (1980); *Martin* v. *City of Struthers*, 319 U.S. 141, 146-49 (1943); *cf. Cohen* v. *California*, 403 U.S. 14, 21 (1971). Adults who affirmatively invite broadcast speech into their homes are not "captive audiences." They may avoid speech they find offensive, upsetting, or boring with a twist of the dial or by checking TV and radio listings, or by comporting their listening and viewing habits with clear time-channeling rules. The *de minimis* upset experienced by an adult who momentarily tunes into an offensive broadcast can hardly justify the absolute ban that the FCC seeks to impose upon all Americans. *See Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970).

The government primarily relies on a wholly unwarranted reinterpretation of this Court's decision in *Pacifica*. In *Pacifica*, of course, this Court was not presented with a total ban on protected speech. Thus, the Court's brief general discussion of the "individual's right to be left alone" in the home, 438 U.S. at 748, cannot support the much more sweeping *total* ban at issue here. As noted, *supra*, the decision in *Pacifica* was "an emphatically narrow holding," *Sable*, 492 U.S. at 127, which repeatedly emphasized the particular program at issue, the time of the broadcast, and the interest in protecting young children. *Pacifica*, 438 U.S. at 750; *id.* at 760 (Powell, J., concurring). Indeed, the Court in *Sable* explicitly distinguished *Pacifica* by stating, "The FCC rule [in *Pacifica*] was not intended to place an absolute prohibition on the broadcast of this type of language, but rather *sought to channel it* to times of day when children most likely would not be exposed to it. . . . The issue of a total ban was not before the Court." 492 U.S. at 127 (emphasis added, internal quotations omitted). At most, *Pacifica* acknowledged that the pervasiveness of the broadcast media, in conjunction with the presumed presence of children in the audience, permitted

limited regulation in order to channel "offensive" speech to particular times of the day. *Id.* at 757 (Powell, J., concurring). As Justice Powell stated in his concurrence:

> [t]his is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.

438 U.S. at 759-60; *see also* Pet. App. at 49a-50a (FCC acknowledges that *Pacifica* prohibits an absolute ban); *Bolger*, 463 U.S. at 72 ("we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended"); *Carey* v. *Population Services Int'l*, 431 U.S. 678, 701 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Cohen*, 403 U.S. at 21.

There is no reason for this Court to consider the government's unprecedented position that protected broadcast speech may be totally suppressed because it might be offensive to some adults with delicate sensibilities. Coverage of American soldiers dying in a far-off war, criticism of United States policies, public hearings or trials on the alleged sexual conduct of public officials or celebrities, and discussions of critical public health issues such as AIDS may be offensive, indeed shocking, to many. This Court, however, has explicitly warned of the dangers posed by such government censorship:

> The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen, 403 U.S. at 21.[13/]

II. Petitioners provide no reason for this Court to review the decision of the court below that the government need not as a factual matter, and may not as a matter of law, accomplish its interest in facilitating parental control over their children by "'reduc[ing] the adult population . . . to . . . only what is fit for children.'" *Bolger*, 463 U.S. at 73 (quoting *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957)). The court of appeals' decision finds ample factual support in the record and deviates in no way from well-established law. Moreover, the government is simply wrong in contending that the court below did not consider the record. Its decision makes clear that it found the record insufficient to support the ban and remanded to the FCC to conduct a full and fair hearing on numerous unresolved issues. Pet. App. 12a.

Thus, for instance, the court found inadequate the FCC's almost exclusive reliance on data on the listening and viewing habits of 12-17 year-olds as an undifferentiated bloc, with virtually no data on children under 12 years. *See* Pet. at 17; Pet. App. 111a-121a. In the past, the FCC had focused its attention only on children under age twelve, and it had virtually no evidence that any significant number of children in this age group are in the broadcast audience after 10:00 p.m. As a result, having determined in advance "to compile a record in support of Congress' imposition of a 24-

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[13/] Even were protecting residential privacy a compelling interest here, time-channeling cures any concern about protecting those adults who want to avoid the risk of exposure to indecent material. These adults may check their TV and radio listings before turning on their sets, or, if unsatisfied with anything less than absolute assurance, may simply choose to avoid late night television or radio. Thus, a total broadcast ban that denies every adult in this country access to constitutionally protected speech is not the least restrictive, or even a narrowly tailored, means of serving the government's purported interest.

hour ban," 4 F.C.C.Rcd 8358, J.A. 12, the FCC had no choice but to redefine "children" to include 17 year-olds. The court below, however, refused to accept on this incomplete record the FCC's decision to raise the age of "children" to include high school seniors and college freshmen, and thus remanded to the FCC to "redetermin[e], after a full and fair hearing . . . the appropriate definitions of 'children.'" *Id.* at 12a; *see id.* at 32a-33a (*ACT I*).[14/]

Furthermore, the court of appeals decision comports with settled law and raises no legal issue warranting this Court's review. Neither this Court nor the lower federal courts have ever upheld an absolute content-based ban on constitutionally protected "indecent" speech within an entire medium of expression, in order to protect children or otherwise, and petitioners have presented no reason to revisit that issue here. *See, e.g., Sable*, 492 U.S. 115; *Pacifica*, 438 U.S. at 733 (FCC rule not "intended to place an absolute prohibition on the broadcast of this type of language"); *Bolger, supra*, 463 U.S. 60; *Community Television of Utah, Inc.* v. *Wilkinson*, 611

[14/] High school students clearly have a constitutional right to receive information that the FCC would consider indecent. *See Bolger, supra*, 463 U.S. at 74 n.30; *Erznoznik, supra*, 422 U.S. at 213-14 & n.11. Moreover, high school students are regularly exposed to literary works in their libraries and curricula that clearly fall within the FCC's generic standard. *See* PEN Comments, at 21-22 & n.26, J.A. 393-94. High school age minors also have substantial constitutional and statutory rights that recognize their sexual maturity and knowledge. *See, e.g., Carey, supra*, 431 U.S. at 694-99. Most states, for example, permit teenagers to consent to health services related to pregnancy and for sexually transmitted disease. Indeed, it simply blinks reality to claim that, in this day of explicit AIDS education, high school students are in need of protection by the government, regardless of parental wishes, from the sort of social satire, double-entendre, sexual innuendo, and pop music that the FCC has found indecent. *See* Pet App. 162a-191a; J.A. 714-78.

F.Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988); *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985); *cf. City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding content-*neutral* regulation of location of adult theatres only because adult theatres are *not* banned altogether); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (content-neutral ban on all live entertainment in municipality held unconstitutional); *see also* FCC Report, Concurring Statement of Commissioner Quello, at 1 & n.3 (collecting cases), J.A. 78.

The undisputed factual record also demonstrates that virtually all parents have the opportunity to supervise, or to have another adult supervise, their children's viewing or listening activities, particularly at night. Pet. App. 121a-123a; *see* Comments of ACT, at 29-35, and Appendix C, J.A. 130-36, 232-50. Faced with this evidence, the FCC now asserts that it will be satisfied only with "active" parental supervision, Pet. App. 6a, which the FCC defines as "requir[ing] parents either to co-view or co-listen, or to remain actively aware of a child's viewing or listening at all times." *Id.* 128a; *see id.* at 121a-129a. Thus, the government has come full circle from its stated position in *Act I* that "the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes," *id.* at 37a (emphasis original). Its position before this Court is that parental wishes are irrelevant, and that the government, having determined for itself what is proper parental supervision of all minors under age 18, and having determined that not all parents meet this standard, has decided to eliminate parental choice entirely in this area.

The court below, in determining that the absolute ban was not a precisely drawn response to the government's legitimate interests in protecting children, quite properly

rejected the FCC's unprecedented determination of what constitutes proper parental supervision, and its decision to eliminate parental choice in how they will supervise their children's receipt of constitutionally protected expression. *See id.* at 6a, 9a-11a. As a constitutional matter, the relevant inquiry must be whether parents have *the opportunity* to supervise their minor children, not whether they police their children precisely according to the government's dictates. *See Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968) ("constitutional interpretation has consistently recognized that the parents' claims to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Cruz*, *supra*, 755 F.2d at 1420 (availability, rather than actual usage of, cable lockboxes sufficient to hold ban on indecent broadcasts on cable television unconstitutional).

As the government forthrightly acknowledged in *ACT I*, its sole legitimate interest in this matter is to facilitate parental supervision of their children, not to replace parents with a broadcast "Big Brother." *See, e.g.*, *Bolger*, 463 U.S. at 73-74; *Ginsberg*, 390 U.S. at 639; *Fabulous Assoc., Inc.* v. *Pennsylvania Publ. Utilities Commission*, 896 F.2d 780, 788 (3d Cir. 1990). The government is not the nation's super-parent, and it has no right to mandate parental behavior in the area of receipt of constitutionally protected speech merely because it would prefer that parents deny to their teenage children material that a majority of FCC commissioners deems "indecent."

The FCC's findings, moreover, are directly contrary to common sense. Parents who really are concerned with and want to protect their children from "indecency" have the opportunity to take whatever steps they deem necessary to prevent their children from watching or listening to programs

they believe are unsuitable.[15/] Indeed, the FCC, in its 1987 Reconsideration Order, found it reasonable after midnight "to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience." Pet. App. 62a-63a n.47; *see also Pacifica Foundation* v. *FCC*, 556 F.2d 9, 36 (D.C. Cir. 1977) (Leventhal, J., dissenting) ("children are likely to be in the audience, but are also likely to be under parental control, in the case of those parents who really are concerned with and want to avoid the exposure of their children"), *rev'd*, 438 U.S. 726 (1978). Nothing in the record vitiates the reasonableness of the FCC's prior view.

Finally, the government improperly contends that the adult broadcast audience may be reduced to that which is fit only for children because of the availability of "indecent" speech in other media. Pet. at 19. However, an absolute ban on "indecent" broadcast speech is especially improper precisely because broadcasting is pervasive. Radio and television are undoubtedly the primary means by which large numbers of Americans, especially adults, receive news, information, and entertainment. The FCC simply ignores reality when it asserts that generically defined "indecent" broadcast programming is largely fungible with "indecent" materials in other media.[16/]

[15/] These options include, *inter alia*, co-viewing and co-listening, actually monitoring their children's watching or listening, prohibiting their children's use of television or radio during certain hours, purchasing televisions with channel blocking devices (which are now widely available, *see* Pet. App. 125a n.84), or taking possession of their children's television sets and radios.

[16/] As the record demonstrates, much of the programming which falls within the FCC's broadcast ban is otherwise unavailable to the public. *See* n.5, *supra*. Moreover, the Supreme Court has consistently rejected the argument that a content-based prohibition may be sustained

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III. Nothing in the Helms Amendment, or in any decision of the courts, compels the FCC to abide by its broad generic definition of indecency. Should this Court deny the petitions for certiorari, therefore, the FCC on remand will be free (and respondents will urge it) to adopt a definition more narrowly tailored to achieve the government's legitimate purposes. Such a narrowing of the definition might then affect how the courts would view the constitutional issues raised by any rule which the FCC ultimately adopts. Review by this Court now would be premature and may be rendered unnecessary depending on the FCC's and the court of appeals' actions upon remand.

In the court below, respondents argued that the FCC's generic definition of indecency is unconstitutionally vague and overbroad and that, in any event, the 24-hour ban may not be sustained in light of the FCC's inherently vague definition. The court, without further analysis, stated that its holding in *ACT I* "precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague." *Id.* at 7a. In light of its ruling that the 24-hour ban could not stand, moreover, it had no need to address respondent's alternative contention that, even if a 24-hour ban were theoretically permissible, it could not be sustained in conjunction with the vague, overbroad definition.

In *ACT I*, the court concluded that this Court's disposition of *Pacifica* precluded it from addressing the question whether the FCC's generic definition of indecency is unconstitutionally vague. Pet. App. 25a-26a. The court noted, however, that "[w]e have upheld the FCC's generic definition

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[16] (...continued)
because of the theoretical availability of an alternative medium of expression. *See, e.g., Bolger*, 463 U.S. at 69 n.18; *Consolidated Edison, supra*, 447 U.S. at 541 n.10 (1980); *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

of indecency in light of the sole purpose of that definition: to permit the channeling of indecent material, in order to shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear." *Id.* at 29a-30a. Now that the FCC has foregone channeling and has acted to banish "indecent" speech from the airwaves 24 hours a day to "protect" adults as well as minors, however, the underlying premise for the lower court's rejection of overbreadth and vagueness challenges in *ACT I* no longer obtains.[17/]

Whether the generic definition standing alone is unconstitutional, there is no doubt that the definition necessarily leaves broadcasters guessing as to what material they may safely air. Nevertheless, since 1987, the FCC has steadfastly refused to clarify this standard to make it comprehensible to

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[17/] Respondents herein contend, as they did below, that the generic definition is unconstitutionally vague and overbroad, and that this defect provides an alternative basis for affirmance of the decision below in the event *certiorari* were granted. *See Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). In *Pacifica*, this Court, in response to an argument that the identical generic definition was unconstitutional because "the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech," 438 U.S. at 742, stated that this "argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." *Id.* Thus, the Court expressly did not address the constitutionality of the generic definition. *See Carlin Communications, supra,* 837 F.2d at 559 ("The *Pacifica* Court declined to endorse the Commission definition of what was indecent"). Moreover, following this Court's holding in *Pacifica*, the FCC felt compelled to abandon the generic standard for the substantially narrower and more precise definition which it thereafter followed until 1987. *See* Pet. App. 43a. Were this Court to determine that the FCC's definition of indecent speech is itself unconstitutionally vague or overbroad, it need not address the merits of the 24-hour ban at this time.

broadcasters. *See, e.g.*, Pet. App. 52a-54a. The combination of a broad and vague generic definition of indecency and a twenty-four hour ban will not only eliminate from the airwaves all constitutionally protected speech that the FCC deems "indecent," but will inevitably have the *in terrorem* effect of chilling broadcasters from airing substantial amounts of speech of significant merit that the FCC might find *not* "indecent," but which a broadcaster might reasonably fear would be so construed by a majority of the Commissioners of the FCC.

When there is a clearly defined safe harbor, a broadcaster at least has the option of broadcasting potentially "indecent" speech during that time period, and willing adults at least have the option of tuning in at that time.[18/] Thus, the problem of a twenty-four hour ban of generic indecency is not only that great literary works may be deemed "indecent" and therefore banned from the airwaves; the problem is that even if the FCC might ultimately deem such works "decent," no broadcaster, particularly a noncommercial broadcaster with limited resources, will in the first instance dare to air such works at the risk of losing its license or incurring a substantial

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[18/] Respondents do not concede that such a solution is constitutional. An unconstitutionally vague or overbroad law should not be upheld simply because it does not apply everywhere and at every time. Rather, vagueness doctrine requires that prohibitions on speech be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974); *see also Houston* v. *Hill*, 482 U.S. 451, 465-67 (1987) (overbroad law "accords the police unconstitutional discretion in enforcement"). The FCC's generic definition fails both tests.

financial penalty.[19/] As this Court has consistently recognized, one of the worst vices of both overbroad and vague rules is their tendency to chill or deter constitutionally protected speech. *See, e.g., Secretary of State* v. *J.H. Munson Co.*, 467 U.S. 947, 958 (1984); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). Indeed, "[f]ar from providing the 'breathing space' that 'First Amendment freedoms need . . . to survive,'" *Houston* v. *Hill*, 482 U.S. 451, 467 (1987) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)), the generic definition, combined with the 24-hour broadcast ban, will deprive the American people of important and valuable speech not available in any other medium of expression.

[19/] *See* 47 U.S.C. § 503(b)(1)(D), (2)(A) (penalties of up to $25,000 per violation of 18 U.S.C. § 1464); *id.* § 312(a)(6) (revocation of a station license for violation of section 1464). These are not merely hypothetical concerns, as the Comments of Pacifica, at 13-20 and Attachments 1 & 2, J.A. 320-27, 332-34, 348-60, show with regard to such literary classics as *Ulysses*, *The Grapes of Wrath*, and *Howl*. *See* n.5, *supra*.

CONCLUSION

For the reasons stated herein, the petitions for writs of certiorari should be denied.

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